LING KUOK TECK & ANOR.

v.

TSENG CHOON CHIN @ TAY BAK HUI & 5 ORS.

HIGH COURT SABAH & SARAWAK, SIBU
TUAN HJ. MUHAMMAD KAMIL B. AWANG J
[SUIT NO. 6 OF 1993]
22 MARCH 1995

PRACTICE & PROCEDURE: *Defendants obtaining judgment against plaintiffs in earlier suit - Judgment obtained under 0. 18 r. 19 Rules of the High Court 1980 - Plaintiffs claiming judgment obtained by fraud - Application to impeach, set aside and/or rescind judgment - Non-disclosure of documents during the earlier hearing - Duties of disclosure on parties - Consideration of the elements of fraud - Whether the plaintiffs had shown fraud on the part of the defendants - Plaintiffs attempting to rely on new evidence - Whether permissible - Whether the conditions in Ladd v. Marshall satisfied.*

EVIDENCE: *Failure to call solicitor who prepared documents - Whether adverse inference to be drawn from such failure - Consideration of s. 114 (g) of the Evidence Act 1950.*

The defendants were co-proprietors of two parcels of land. The defendants entered into an agreement for the development of the said land. The developer sold sublot 35 in the said land to the plaintiffs *vide* a sale and purchase agreement. The defendants applied for and obtained judgment against the plaintiffs under O. 18 r. 19 of the Rules of the High Court 1980 (RHC 1980), on the grounds that the developer did not have the authority to sell, and, pursuant to the said judgment, evicted the plaintiffs from the said lot.

The plaintiffs filed the present suit to have the said judgment impeached, set aside and/or rescinded, and for consequential relief, on the grounds that the said judgment had been obtained by fraud for non-disclosure of two vital documents at the trial. In the alternative the plaintiffs pleaded that the judgment ought to be set aside on the ground of new evidence found by the plaintiffs since the said judgment was delivered.

Held:

[1] While it is true that in an application for a summary judgment under O. 18 r. 19 RHC 1980 there is no discovery or inspection of documents made, it is accepted that in such an application there is a duty that the parties must disclose all documents which relate and are relevant to the application.

[2] In the earlier suit the Court had been misled into believing that there had not been a single document to substantiate the authority of the developer to sell sublot 35 to the plaintiffs. The withholding of the two documents at the trial of the earlier suit was crucial; by concealing them the defendants had committed an unconscionable conduct, which amounts to a fraud. The elements of fraud particularised in the statement of claim have been proved and on that ground alone the earlier judgment cannot stand unimpeached.

[3] On the question of whether the judgment could be set aside on the ground that the plaintiffs had discovered new evidence subsequent to the granting of the said judgment, in *Halsbury's Laws of England* it is said that an action will lie to rescind a judgment on the ground of discovery of new evidence which would have a material effect on the decision of the Court. On the facts of the present case it was clear that the plaintiffs had satisfied the three conditions to justify the reception of fresh evidence as set out in *Ladd v. Marshall.*

[4] It is an established principle of law that an adverse inference under s. 114(g) of the Evidence Act 1950 may be drawn where there is a withholding or suppression of evidence or for the non-production of an important and material document or witness. The failure of the defendants to call the solicitor who prepared exhibits P3 and P4 despite their pleadings in paragraph 8 of the defence leads to the drawing of an inference that in the event the solicitor was called, his evidence would be adverse to the defendants' case.

[Plaintiffs' application allowed with costs. Earlier judgment set aside. Execution proceedings under earlier judgment declared a nullity]

Cases referred to:
Jonesco v. Beard [1930] All ER Rep. 483 ***(cit)***
Abdul Hamid b. Hj. Rahmat v. D & C Bank [1993] 1 MLJ 306 ***(cit)***
Dr. Ramachandran a/l Sivaguru v. Perwira Habib Bank Malaysia Berhad [1993] 3 MLJ 59 ***(cit)***
Wyatt v. Palmer [1899] 2 QBD 106 ***(cit)***
Poon Kng Siang v. Tan Ah Keng [1992] 1 SLR 562 ***(refd)***
Mohamed Isa v. Hj Ibrahim [1968] 1 MLJ 186 ***(refd)***
Assets Co. Ltd. v. Mere Roihi [1905] 176 @ 210 ***(refd)***
Ping Anak Layang v. Jee Shik Chuong [1991] 2 MLJ 422 ***(refd)***
Lim Yoke Kong v. Sivapiran a/1 Sabapathy [1992] 2 MLJ 571 ***(refd)***
Chu Choon Moi v. Ngan Sew Tin [1986] 1 MLJ 34 ***(refd)***
Bakmawar Sdn. Bhd. v. Malayan Banking Bhd. [1992] 1 MLJ 67 ***(refd)***
Ladd v. Marshall [1954] 1 WLR 1489, [1954] 3 All ER 745 ***(foll)***
Hua Joo Development Co. Sdn. Bhd. v. Survey Development Service [1994] 1 CLJ 73 ***(refd)***
Melombong & Perumahan Sdn. Bhd. v. Suntra a/l Thangiah & Anor. Judgment Today No. 20/92 ***(refd)***
Plenitude Holdings Sdn. Bhd. v. Tan Sri Khoo Teck Puat [1992] 2 MLJ 68 ***(refd)***
Lin Lin Shipping Sdn. Bhd. v. Govindasamy Mahalingam [1993] 2 MLJ 475 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19(1)(b) & (d)

For the plaintiffs - Wong Ho Leng; M/s. Wong Ho Leng & Co.,
For the defendants - Orlando Chua; M/s. Wong Orlando Chua & Co.,

JUDGMENT

Hj. Muhammad Kamil B. Awang J:

The plaintiffs claimed that the judgment in suit no. 22 of 1991 had been obtained by fraud for non-disclosure of two vital documents at the trial. In this action the plaintiffs applied to have the said judgment impeached, set aside and/or rescinded, and a declaration that the execution proceedings were null and void, for damages or compensation and other reliefs as the Court deems fit.

Brief facts: The plaintiffs were the defendants and the defendants were the plaintiffs in suit no. 22 of 1991 (hereinafter called the "former suit"). In the statement of claim it is stated the plaintiffs were co-proprietors of 2 parcels of lands situate at Sg. Antu, Sibu containing an area of 2.833 hectares (7 acres) and 7.487 meters (1.85 acres) more or less, and comprised in Sibu Occupation Tickets Nos. 34531 and 24012 respectively (hereinafter called the "said lands").

By a development agreement dated 7 November 1978, the plaintiffs engaged Sie Chung Tung Housing Development Company (hereinafter called the "developer") to develop the said lands into a housing estate. The developer and the plaintiffs would be allocated certain share. Later the parties executed a supplementary agreement dated 18 July 1981 to vary their share

allotment. And by a second supplementary agreement dated 2 March 1983, the parties agreed that the development of the said lands by the developer shall be carried out in two phases. The first phase shall consist of 41 sublots and the second phase 29 sublots.

Phase I was completed at the end of 1983, and it includes sublot 35 (now known as Lot 448) which is the subject-matter of this suit.

On 16 July 1983, the developer sold sublot 35 to the defendants *vide* the sale and purchase agreement (Ex. D1). By a writ of summons dated 28 June 1991 the plaintiffs claimed, *inter alia*, for the possession of sublot 35. The summons in chambers application under O. 14 r. 1 and O. 18 r. 19 (Ex. P9) was supported by an affidavit of Tay Kwong Hui affirmed on 24 August 1991 with 5 exhibits (Ex. 4).

The application was opposed by the defendants in the affidavits of Ling Kuok Teck affirmed on 10 April 1992 (Ex. P2) and Sie Chung Tung affirmed on 9 July 1991 (Ex. P8).

The plaintiffs obtained a summary judgment under O. 18 r. 19 Rules of the High Court 1980 (hereinafter called the "said judgment") and the plaintiffs had taken possession of sublot 35 and had the defendants evicted.

In this action the plaintiffs herein applied to impeach the said judgment (Ex. P10) on the ground that it was obtained by fraud, the particulars of which was pleaded in para. 20 in the statement of claim. Alternatively, the plaintiffs claimed that the said judgment ought to be set aside on the ground of new evidence (Ex. P3 and Ex. P4) found by the plaintiffs since the said judgment was delivered.

In the said judgment the Court had considered that the plaintiffs' claim (in the former suit) was so plain and obvious that judgment must be entered for the plaintiffs and that the defendants' defence and counterclaim were so frivolous or vexatious or otherwise an abuse of the process of the Court that it ought to be struck out under O. 18 r. 19(1)(b) and (d) of the Rules of the High Court 1980.

Learned Counsel for the defendants herein submitted that an application under O. 18 r. 19 of the Rules of the High Court 1980 is interlocutory in nature as distinct from a full trial. Suit No. 22 of 1991 (the former suit) was never set down for trial and there was no discovery and/or inspection of documents. The defendants were not obliged to disclose the two documents (Ex. P3 and Ex. P4). The defendants alleged that there was such as stated in paras. 20, 21 and 28 of the affidavit dated 24 August 1991 (Ex. D4). With respect, there is nothing mentioned in paras. 20, 21 and 28 of Ex. D4 as to the existence of the two documents.

Learned Counsel for the plaintiffs contended that in an application for a summary judgment under O. 14, or alternatively to strike out the defence and counterclaim under O. 18 r. 19, it is the duty of the applicant to disclose all those documents which are relevant to the application. In the former suit, in the 4th plaintiff's affidavit dated 24 August 1991 (Ex. D4) in support of his application and at para. 42 thereof it was stated that he verily believed that the defendants herein had no defence whatsoever to their action. This averment was made well knowing that the defendants had a good defence, and these were to be found in the two documents (Exs. P3 and P4) which the plaintiffs had withheld from the Court.

In an application for a summary judgment under O. 18 r. 19 of the Rules of the High Court 1980 there is no discovery or inspection of documents made. It is accepted that in such an application there is a duty that the parties must disclose all documents which relate and are relevant to the application.

Fraud

It has been held that fraud is an extrinsic, collateral act which vitiates the most solemn proceedings of Courts of justice. A judgment obtained by fraud may be treated as a nullity - see *Halsbury's Laws of England*, para. 1553. It is said that a judgment which has been obtained by fraud may be impeached by means of an action (para. 560 *ibid*). The authorities cited are as follows: *Jonesco v. Beard* [1930] All ER Rep. 483; *Abdul Hamid b. Hj. Rahmat v. D & C Bank* [1993] 1 MLJ 306; *Dr. Ramachandran a/l Sivaguru v. Perwira Habib Bank Malaysia Berhad* [1993] 3 MLJ 59 and *Wyatt v. Palmer* [1899] 2 QBD 106.

In the evidence of DW1, Tay Kwong Hui, he admitted that at all material times he had in his possession the two documents which he did not disclose to his solicitors. The plaintiffs kept silent on these two documents. The documents are material. These documents are the agreement dated 12 March 1990 between Kong Ming Bank Berhad (now known as EON Bank Berhad) of the first part, Kong Ming Finance Corporation Berhad (now known as EON Finance Berhad) of the second part and the defendants of the third part (Ex. P3) and a letter dated 1 November 1989 by Messrs. Chan Jugah, Hoo & Co., Advocates addressed to Pegawai Kebankrapan, Kuching, written on the instruction of the defendants (Ex. P4). During the cross-examination DW1 was shown Exs. P3 and P4 and he said that he did not know what these documents were as he could not read English.

Q. Why you did not give these documents to your lawyers?

A. These documents have nothing to do with the purchasers (they are) between myself and the bank.

Q. P3, did you give it to anybody?

A. No

Q. Nobody else knew about these documents?

A. Myself, the bank and the lawyers.

Q. Do the present lawyers know?

A. My present lawyers know not.

I told my present lawyers about the scheme of settlement. My lawyers did not ask whether there was agreement. I told them that this is just an arrangement.

It is evidently clear that the non-disclosure was intentional. It was not inadvertent. It was apparently deliberate so as not to dilute the plaintiffs' case: see *Poon Kng Siang v. Tan Ah Keng* [1992] 1 SLR 562.

It has been held that fraud means actual fraud. In *Mohamed Isa v. Hj Ibrahim* [1968] 1 MLJ 186 the Federal Court held that 'fraud' means actual fraud and in support thereof it cited a passage from the Privy Council in *Assets Co. Ltd. v. Mere Roihi* [1905] 176 @ 210 which reads:

> ...by fraud in these Acts is meant actual fraud, i.e., dishonesty of some sort, not what is called constructive or equitable fraud - an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud.

See also *Ping Anak Layang v. Jee Shik Chuong* [1991] 2 MLJ 422.

The Court has held that non-disclosure of material documents at the trial amounts to an unconscionable conduct. An unconscionable conduct tantamounts to a fraud. In the case of *Lim Yoke Kong v. Sivapiran a/l Sabapathy* [1992] 2 MLJ 571, the respondent was walking along the edge of the road and was negligently knocked down by the appellant. The respondent's solicitor attempted to trace the insurer of the motor-cycle until the expiry of the limitation period. Liability was admitted by the appellant and damages had been agreed. The Federal Court held that by intentionally refusing to come forward in response to the Motor Insurers' Bureau circular letter, the respondent's right had been concealed by the fraud of the insurance company and as such the 6-year limitation period should be postponed until the respondent had discovered the fraud or could with reasonable diligence have discovered it.

As regards "proof" the Supreme Court in *Chu Choon Moi v. Ngan Sew Tin* [1986] 1 MLJ 34 had this to say, at p. 38:

> We agree that fraud whether made in civil or criminal proceedings must be proved beyond reasonable doubt and cannot be based on suspicion or conjecture (*Narayanan v. Official Assignee Rangoon* AIR [1941] PC 93; *Saminathan v. Pappa* [1981] 1 MLJ 121). Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The degree of proof need not reach certainty but it must carry a high degree of probability. What it means is that the evidence adduced is such that the Court believes its existence or a prudent man considers its existence probable in the circumstances of the particular case.

In suit no. 22 of 1991 the Court had been misled into believing that there had been not a single document to substantiate the authority of the developer to sell sublot 35 to the plaintiffs. See *Bakmawar Sdn. Bhd. v. Malayan Banking Bhd.* [1992] 1 MLJ 67.

To my mind, the withholding of the two documents at the trial in the former suit was crucial; by concealing them the defendants had committed an unconscionable conduct, which amounts to a fraud. I am satisfied that the elements of fraud as particularised in the statement of claim herein have been proved. On that ground alone the said judgment cannot stand unimpeached.

New Evidence

In *Halsbury's Laws of England*, para. 561, it is said that an action will lie to rescind a judgment on the ground of discovery of new evidence which would have a material effect on the decision of the Court. In *Ladd v. Marshall* [1954] 1 WLR 1489, [1954] 3 All ER 745, Lord Denning LJ said at p. 748:

> In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled; first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be as such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

See also *Hua Joo Development Co. Sdn. Bhd. v. Survey Development Service* [1994] 1 CLJ 73.

According to the testimony of PW1 on 9 November 1992 he was informed by PW2 that the latter had found two important documents and asked him to go to PW3's office.

PW2 gave evidence that on 6 November 1992 someone called him and told him that two important documents would be sent to him in a few days time. On the morning of 9 November 1992 in his letter box he found two documents tied up with a rubber band. The documents were not there in the letter box the previous evening. He informed PW1 about the discovery of the documents and then took the said documents straight to see PW3.

PW3 testified that he was the Counsel acting for the plaintiffs who were the defendants in the former suit. He said that at the time when he filed the two affidavits in opposition to the summary application (former suit) he did not have Exs. P3 and P4. In fact he saw the two documents for the first time on 9 November 1992. These facts are not disputed.

DW1 testified that he had at all material times in his possession these two documents P3 and P4 but he did not give them to his solicitors. If the solicitors handling the case were not shown any such documents, how could the solicitors make the disclosure at the trial of the former suit. It was not possible for the defendants in the former suit to obtain these documents, however diligent they could be in attempting to discover the documents which they knew not. Condition one of *Ladd v. Marshall* (*supra*) is clearly satisfied.

In the statement of claim (in the former suit) dated 18 June 1991, para. 5 states:

> On or about 2 March 1983, having obtained the appropriate approval from the Lands and Surveys Department, Sibu of the said site plan, the plaintiffs and the said deceased entered into a second supplementary agreement with Sie Chung Tung Housing, wherein it was provided, *inter alia*, that the development of the said lands by Sie Chung Tung Housing shall be carried out in two phases, the first phase shall consist of 41 subdivided lots and the second phase 29 subdivided lots. Upon the completion of the first phase, the plaintiffs and the said deceased shall jointly be entitled to own sublots Nos. 1, 2, 5, 6, 8, 16, 36, 41, 20, 21, 22, 25, 26 and 35 and also a share in sublot 19 together with the various residential houses erected thereon and that the remaining sublots contained in the first phase shall be allocated to Sie Chung Tung housing.

At this point of time, phase II had not commenced. This is undisputed. It is clear that the present suit concerns only with phase I, i.e., 41 lots. The share of the plaintiffs was 14 lots and joint share in Lot 19. The developer share totalled to 26 lots.

In Ex. P3 recital, para. 3, states the following:

> Pursuant to the joint venture agreement and the supplemental agreements dated 18 July 1981 and 2 March 1983 (hereinafter jointly called "the agreements") Sie Housing was to be entitled to twenty-six (26) houses from the first phase of the development of the lands (hereinafter called "Sie lots") while the owners are entitled to the remaining sixteen (16) lots comprised of fourteen (14) houses and two (2) vacant residential lots (hereinafter called the "the owners' lots").

In Ex. P4, para. 7, states:

> Under and by virtue of the said agreement the said Sie Chung Tung (borrower) was beneficially entitled to twenty-six (26) sublots together with the buildings constructed thereon as more particularly described in the 2nd Schedule hereto (hereinafter called "the Developer's lots"). While the remaining sixteen (16) parcels belong to the landowners as described in the 3rd Schedule hereto (hereinafter called "the owners' lots").

This confirms para. 5 of the statement of claim that the developer was entitled to 26 lots in phase I, and the owners were entitled to 14 lots i.e., taking away sublot 19 and the other vacant lot from phase II.

Despite the clear and explicit pleadings in his statement of claim in the former suit, DW1 maintained that the owners are entitled to 18 lots while cl. 1 of Ex. D3, the second supplementary agreement, shows clearly that the owners are entitled to 14 lots while the developer is entitled to 26 lots, with the remaining one lot shared. The plaintiffs were bound by their pleadings.

The question central to this application: Had the developer the authority to dispose of sublot 35 to the plaintiffs?

PW1 in his evidence-in-chief said that prior to entering into the sale and purchase agreement dated 16 July 1983, he approached DW1 who was known to him. He was assured by DW1 that the developer had the authority to sell sublot 35 as the said sublot beneficially belonged to the developer. Only after such confirmation did he ask PW3 to prepare the sale and purchase agreement. After he had executed the sale and purchase agreement, he informed DW1 about it. He also told DW1 that he would be moving into the house soon. In fact he moved into the said house in August 1983.

PW1 is a civil servant who had been all the time in the police force. As a wage earner with a fixed monthly income, it must have been hard for him to raise the sum of RM68,000 with which he paid part of the purchase price of the house on sublot 35. He had been a policeman for well over 25 years, and this is the first house which he bought jointly with his mother (deceased), the 2nd plaintiff. There is no doubt that he must have taken pains to contact DW1 who he knew personally and the developer, and was satisfied that sublot 35 was beneficially owned by the developer before he bought the house. I am satisfied with the truth of his testimony.

PW3 testified that he received instructions from PW1 and the developer to prepare a sale and purchase agreement in respect of sublot 35. PW3 was a senior and an experienced lawyer. He said that he read the development agreement and the supplementary agreements, so he knew or ought to have known the respective parties entitlement. He then telephoned DW1 who told him to proceed, to prepare and execute the sale and purchase agreement as sublot 35 in fact beneficially belonged to the developer. He was informed that there was an arrangement between the developer and the landowners. PW3 also made inquiries from the developer who confirmed that sublot 35 beneficially belonged to the developer. After the execution of the sale and purchase agreement, PW3 again informed DW1 about it by phone.

PW3 further testified that apart from the sale and purchase agreement (Ex. D1), he prepared 3 other sale and purchase agreements in respect of 3 other sublots in phase I. They were Exs. P14, P15 and P16. As it had been his practice in drawing up a sale and purchase agreement, PW3 did not recite all the relevant documents so long as he was satisfied after due enquiry into the matter. The same procedure was followed, i.e., first making inquiry from the landowners, preparing the agreements and executing the same, and then informing the landowners again by phone. PW3 said that the houses under Exs. P14, P15 and P16 were duly transferred to the purchasers. These agreements were never challenged as being improper or not valid.

Under para. 9 of Ex. D2, it was stipulated that all instruments pertaining to the sale shall be prepared and executed by a legal firm of Messrs. David Tiong & Michael Ong, Advocates. But in practice, this was not strictly observed. Besides PW3 another solicitor Mr. David Ting had also been engaged to prepare sale and purchase agreements in respect of this project. The landowners made no protest but gave effect to the transfers.

In the evidence-in-chief, DW1 denied that this was the case as he did not know who PW1 and PW3 were, and least of all they did not contact him. Considering the fact that the defendants had accepted the 3 sale and purchase agreements Exs. P14, P15 and P16 and ultimately these houses were transferred to the respective buyers, it is apparent that PW3 must have liaised with the landowners besides the developer.

This is further clarified by Exs. P3 and P4. Schedule I to Ex. P3 states that sublot 35, which is lot 448 Block 4, Sungei Merah Town District, belonged to the developer. The Second Schedule to Ex. P4 described Lot 448 as belonging to the developer. Ex. P3 was executed by the landowners while Ex. P4 was written by the lawyers under the instructions of the landowners. There is no doubt at all sublot 35 is in fact Lot 448.

It is observed that reading Schedule II to Ex. P3 sublot 23 is described as Lot 436 and sublot 38 as lot 451, which should have been the developer's lots under the agreements, are described as belonging to the landowners. DW1 offered no explanation for this. PW1's and PW3's testimonies that there was this arrangement between the landowners and the developer must be correct. On the totality of evidence before the Court, I am satisfied that there was some sort of arrangement between the developer and the landowners and I hold that the developer must have the authority to sell sublot 35 to the plaintiffs.

DW1 maintained that the developer was entitled to 22 lots only and that by Exs. P3 and P4 the developer's entitlement of 26 lots was because of the requirement of the bank and the finance company that they wanted the landowners to charge 4 more lots to them before they could approve a loan of RM500,000 to the developer. The bank and the finance company insisted that the developer should have 26 lots and in fact the lots came from the landowners and that the 26 lots to the developer was a condition precedent for the grant of the loan.

DW1 said further that the landowners had agreed to put in the 4 lots so that the loan and the memoranda of charges 4 and 5 could be effected. Charges 4 and 5 (at p. 137 agreed bundle of documents) pertain to memoranda of charges in favour of Kong Ming Finance Corporation for RM200,000 and RM300,000 respectively, *vide* charges - Sibu Nos. L. 2046/84 and L. 2047/84 both dated 9 May 1984. There is abundant evidence which says that phase I was in fact completed in October 1983 as stated in para. 6 of the statement of claim. DW2 testified that he inspected the site with his manager and confirmed that phase I was completed in October 1983. If that is so, why should there be any more loan or charge for the project in 1984? DW1's evidence appears to be groundless and it cannot be correct.

DW2 testified that the borrower wanted RM500,000 million loan, the finance company wanted 4 additional lots from the owners' lots as security. Under an incisive cross-examination, DW2 confirmed that the 4 additional lots requirement was imposed at the time when the loan of RM500,000 was granted to Mordiah Construction company, and Mordiah Construction Co. was connected to the charges No. L. 2046/84 and No. L. 2047/84. This had no connection whatsoever with the development of the said lands simply because phase I was already completed.

Ex. P3 recital 4 states that the developer Sie Chung Tung Housing Development company took only a loan of RM150,000 from the Bank; recital, paras. 4(b) and 5(a) state that Sie Chung Tung Housing borrowed from the finance RM100,000 and RM150,000 respectively, and recital paras. 4(c) and 5(b) state that Mordiah Construction Co. borrowed the sums of RM200,000 and RM300,000 respectively. These loans were made well after October 1983 when the work in phase I had been completed. It is noted that Sie Chung Tung Housing and Sie

Chung Tung Housing Development company, are two separate entities. Both Sie Chung Tung Housing and Mordiah Construction Co. were not at any time the developer of the said Lands. DW2 confirmed this in his evidence.

In para. 7(h) of the defence, the defendants said that it was the strict requirement of the bank and the finance company that the landowners' lots should comprise of 26 lots to secure the account of the developer, and that the defendants had no choice but to take 4 lots out of their own lots to meet the requirement of the chargee. It is evidently clear that the issue of settlement of the developer's account arose in 1985 when the finance company decided to sue the landowners, after it was found that the developer had absconded to Taiwan. It is also clear that the developer's entitlement remained at 26 lots since D3. Were the documents P3 and P4 disclosed at the trial in the former suit, the Court would certainly have not shut out the defendants from proceeding further to assert their claim. A summary judgment under O. 18 r. 19 would not have been entered against the defendants. See *Melombong & Perumahan Sdn. Bhd. v. Suntra a/l Thangiah & Anor*. Judgment Today No. 20/92. Condition 2 of *Ladd v. Marshall* is satisfied.

The defendants were the signatories of Ex. P3 and they instructed their solicitors, Chan, Jugah & Hoo to write the letter Ex. P4. There is no doubt that these documents must be true. Condition 3 of *Ladd v. Marshall* is satisfied.

I have observed DW1's demeanour during the trial, he was decidedly evasive and had uttered an untruth whenever it suits him. His only ethic is to win by any means. I form the distinct impression that DW1 is an unprincipled, greedy and generate liar. Almost all of his testimony bore not even a remote resemblance to truth.

In the examination-in-chief, DW1 stated that phase I was completed at the end of 1985, while in para. 9 of his affidavit D4 it was stated that phase I was completed in October 1983. Later, he changed his evidence to say that October 1983 was correct.

DW1 testified that the development project was stopped because there were troubles with the purchasers, and he issued a summons against the bank which forced the bank to negotiate with him. There was no evidence that such an action had been taken.

DW1 testified that after he had found out that the plaintiffs had wrongly occupied sublot 35, there were negotiations between the plaintiffs and the defendants. The defendants were prepared to sell to the plaintiffs sublot 35 for RM125,000. However, the plaintiffs offered to pay only RM115,000. In DW1's affidavit D4 in para. 12 it is stated that DW1 and his brothers were prepared to accept a sum of RM115,000 for the disposal of sublot 35.

DW1 testified that the 26 sublots was a condition precedent to the granting of a loan to the developer. It was clearly shown that the requirement was made at a time when Mordiah Construction Co. was not the developer. DW2 testified that the loan and had nothing to do with the development of the project because phase 1 had been completed.

Under an incisive cross-examination, DW1 stated that he did not disclose P3 and P4 in the trial of the former suit because he did not know English. In the next breath he said that they did not concern the defendants as these two documents were made between the landowners and the bank and finance company, and Pegawai Kebankrapan. Bearing in mind that the landowners had instructed the solicitors to prepare P3 and P4, and had taken legal advice in respect thereto, it is absurd to suggest that the documents had no relevance to the application in the former suit, first the documents concern the said lands i.e. phase 1, and

secondly, the defendants were concerned as purchasers of sublot 35 (later Lot 448). It is unthinkable that having abide by legal advice or guidance, DW1 chose to hide P3 and P4 away from his own solicitors in the former suit.

It is apparent that uppermost in his mind, DW1 was set to win, to gain and take advantage of the situation and in the circumstances he had ceased to act as a reasonable man. In the words of Charles Dickens in *Nicholas Nickleby*. "Among men who have sound and sterling qualities, there is nothing so contagious as pure openness of the heart". In contrast, DW1 conceals his limitless cunning under a cloak of almost halting juvenile deference. It is "sordid, despicable, mendacious, heinous ... spewing forth a litany of lies". It is an established principle of law that an adverse inference under s. 114(g) of the Evidence Act 1950 may be drawn where there is a withholding or suppression of evidence or for the non-production of an important and material document or witness. See *Plenitude Holdings Sdn. Bhd. v. Tan Sri Khoo Teck Puat* [1992] 2 MLJ 68 and *Lin Lin Shipping Sdn. Bhd. v. Govindasamy Mahalingam* [1993] 2 MLJ 475. The defendants herein did not call the solicitor who prepared P3 and P4 despite their pleadings in para. 8 of the defence. The Court therefore can draw an adverse presumption under s. 114(g) of the Evidence Act that in the event the solicitor is called his evidence would be adverse to the defendants' case.

In the circumstances and on the totality of evidence, I would order that the judgment dated 12 June 1992 be set aside. I would declare that the execution proceedings pursuant to the order taken against the plaintiffs is a nullity and that the defendants pay compensation or damages to the plaintiffs for loss sustained as a result of the judgment or its execution to be assessed by the Senior Assistant Registrar.

Costs to the plaintiffs to be taxed. The deposit made at the start of this suit be refunded forthwith to the plaintiffs.